APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-3920.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

BASIC AMERICAN INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

Argued May 8, 2001.
Decided June 5, 2001.

Before BAUER, POSNER, and COFFEY, *Circuit Judges*.

POSNER, *Circuit Judge*.

The Multiemployer Pension Plan Amendments Act, 29 U.S.C. §§ 1301 *et seq.*, requires an employer that withdraws from a plan which is not overfunded to pay a "withdrawal liability" calculated to avoid shifting the cost of that employer's pension obligations to the other employers. E.g., *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 416-17, 115 S.Ct. 981, 130 L.Ed.2d 932 (1995); *Central States, Southeast & Southwest Areas Pension Fund v. Hunt Truck Lines, Inc.*, 204 F.3d 736, 739 (7th Cir. 2000); *Central States, Southeast & Southwest Areas Pension Fund v. Creative Development Co.*, 232 F.3d 406, 408-09 (5th Cir. 2000). The district court dismissed this suit by the Central States multiemployer pension plan for payment of withdrawal liability as barred by the Act's six-

year statute of limitations. 29 U.S.C. §1451(f). A brief chronology will aid in focusing the issue.

On June 22, 1989, a trio of affiliated corporations (collectively "Allied Grocers"), employers that were members of the Central States plan, declared bankruptcy under Chapter 11 of the Bankruptcy Code. According to Central States, the declaration of bankruptcy entitled it, under the terms of the multiemployer plan, to declare that Allied was in default of its withdrawal liability obligations, though it had not yet actually withdrawn from the plan. The statute defines "default," so far as bears on this case, as "any . . . event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." 29 U.S.C. § 1399(c)(5)(B). Central States' plan makes an employer's declaration of bankruptcy a default. And under the statute a default entitles a plan to "require immediate payment of the outstanding amount of an employer's withdrawal liability." § 1399(c)(5); *Board of Trustees v. Kahle Engineering Corp.*, 43 F.3d 852, 854 (3d Cir. 1994).

On May 18 of the following year, with the Allied bankruptcy still pending, Central States filed a proof of claim in the bankruptcy proceeding, claiming that Allied owed it a withdrawal liability obligation of some $752,000 and setting forth an installment schedule on which it wanted to be paid. Two weeks later, on June 2, Allied ceased operations, a move that effected, as a matter of law, its complete withdrawal from the plan. § 1383(a)(2); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 196, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997); *Central States, Southeast & Southwest Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1341-42 (7th Cir. 1995). Two weeks after that, on June 18, 1990, the plan sent Allied a notice, and demand for payment, of withdrawal liability in the exact amount of the proof of claim in the

bankruptcy proceeding, to be paid in 14 equal monthly installments, the first due on August 1—just as requested in the proof of claim. The record is silent on whether the automatic stay was lifted to permit Central States to make a demand outside of bankruptcy; later we'll see that it is uncertain whether the stay must be lifted to permit such a demand.

On December 27, 1995, Central States and Allied settled the dispute over Allied's withdrawal liability, agreeing that it was $526,000, which became a nonpriority unsecured claim in the bankruptcy. The record is silent on whether any part of the claim was ever paid or whether Allied emerged from its Chapter 11 bankruptcy as an operating company.

Central States brought this suit on July 31, 1996, not against Allied but against Basic American Industries, Inc. and other companies under common control with Allied and therefore jointly and severally liable for Allied's withdrawal obligation. 29 U.S.C. § 1301(b)(1). Some defendants were added later by an amended complaint and there is an issue whether the original defendants were served with process in a timely fashion, but we can avoid these matters and confine our attention to the statute of limitations issue. The suit seeks the same amount as the proof of claim filed in the Allied bankruptcy proceeding and the demand for payment from Allied made by Central States in June of 1990. (There is no suggestion, as yet anyway, that the settlement with Allied capped Central States' claim against the affiliates.) The suit was filed more than six years after the proof of claim, the complete withdrawal by Allied from the plan, and the demand for payment, although less than six years after the first and all subsequent installment payments of Allied's withdrawal liability were due. Central States argues that the statute of limitations did not begin to run for the first of the installments until Allied failed to pay it on August 1, 1990, and for the later installments until their due dates passed without payment.

Central States fastens on the Supreme Court's statement in *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc., supra*, 522 U.S. at 195, 118 S.Ct. 542, that the MPPAA's six-year statute of limitations does not begin to run "until the employer fails to make a payment on the schedule set by the fund," and, as a backup, on the further statement in that opinion that "each missed payment [of an MPPAA installment obligation] creates a separate cause of action with its own six-year limitations period." *Id.* The first statement, as the Court's opinion makes clear, is limited by its context, which did not include bankruptcy. The employer in *Bay Area* ceased operations and withdrew from the plan, whereupon the plan computed the employer's withdrawal liability and demanded payment of it in installments on specified dates. The plan's cause of action accrued, the Supreme Court held, when the employer failed to make the first payment on time. The plan could not have sued earlier because until then the employer had not defaulted on its withdrawal obligation. And since the plan did not invoke the default as a basis for accelerating the due dates of the subsequent installments, those installments were not defaulted until their due dates arrived and the employer again failed to pay. In so holding, the Court expressly rejected (*id.* at 206, 209-10, 118 S.Ct. 542) the contrary view that we had expressed in *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 171-72 (7th Cir.1993).

The Court did not suggest and it would have been contrary to the thrust of its opinion, which (again rejecting our position in *Navco*, see 522 U.S. at 208-09, 118 S.Ct. 542) was to assimilate statute of limitations issues under the Multi-employer Pension Plan Amendments Act to the legal principles generally applicable to statutes of limitations issues, *id.* at 195, 208, 210, 118 S.Ct. 542, to suggest that the only way in which the payor in a contract can default is by failing to pay when payment becomes due. One way is by repudiating the obligation to pay; anticipatory repudiation is a

breach of contract that entitles the payee to sue without waiting for the date when payment was due to come and go. E.g., *Roehm v. Horst*, 178 U.S. 1, 18-19, 20 S.Ct. 780, 44 L.Ed. 953 (1900); *Wisconsin Power & Light Co. v. Century Indemnity Co.*, 130 F.3d 787, 793 (7th Cir.1997); *Nashville Lodging Co. v. Resolution Trust Corp.*, 59 F.3d 236, 245 (D.C. Cir. 1995); E. Allan Farnsworth, *Contracts* §§ 8.20-.23 (3d ed.1999). There is an exception: if the payee has completely performed his side of the contract and is just awaiting payment, he can't declare a breach and sue for immediate payment just because he has reason (even compelling reason) to doubt that the other party will pay when due. E.g., *Roehm v. Horst, supra*, 178 U.S. at 17-18, 20 S.Ct. 780; *Restatement (Second) of Contracts* § 243(3) (1981); Farnsworth, *supra*, § 8.20, pp. 602-03 (3d ed. 1999). The idea behind this dubious rule seems to be that, having performed, the payee can no longer protect himself against nonpayment by suspending performance. In other words, anticipatory repudiation (sometimes called anticipatory breach) is conceived of primarily as a trigger of a contract party's right of self-help, like the breach of a condition in a contract. *See C.L. Maddox, Inc. v. Coalfield Services, Inc.*, 51 F.3d 76, 81 (7th Cir. 1995); *First National Bank v. Continental Illinois National Bank & Trust Co.*, 933 F.2d 466, 469 (7th Cir. 1991); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 599 (7th Cir. 1986); Farnsworth, *supra*, § 8.20, p. 600.

Why the doctrine of anticipatory repudiation should be so limited eludes our understanding. Announcement by the other party that he has no intention of paying should entitle the prospective victim of the payor's breach to take immediate steps to protect his interest, as by suing. Against this it has been argued that the doctrine of anticipatory repudiation "will not intercede to rescue the promisee from the consequences of the absence of an acceleration clause." *Rosenfeld v. City Paper Co.*, 527 So.2d 704, 706 (Ala. 1988);

cf. *First State Bank v. Jubie*, 86 F.3d 755, 760 (8th Cir. 1996). That gets it backwards. Acceleration clauses are inserted to fill a hole in the law of contracts, which has failed here in its traditional and important function of interpolating rights and duties that the parties can be expected to negotiate for, e.g., *In re Modern Dairy of Champaign, Inc.*, 171 F.3d 1106, 1108 (7th Cir. 1999), and thus of economizing on the costs of transacting. Acceleration clauses are a standard contract provision for protecting the payee against the consequences of a breach by the other party; they would be unnecessary were it not for the rule carving out the completed-performance case from the operation of the doctrine of anticipatory repudiation. In any event, the exception is inapplicable here because the Central States plan continues to be obligated to pay the pensions of Allied's former employees.

Our disapproved *Navco* case had involved, in fact, both bankruptcy and repudiation; but these features of the case had played no role in our analysis (which was based on an interpretation of the MPPAA) and were neither involved nor mentioned in *Bay Area*. There is nothing in the latter decision to suggest that they are immaterial. All *Bay Area* holds or implies, at least so far as the present case is concerned, is that withdrawal from the plan is not an automatic default of the obligations that such withdrawal imposes and neither is missing one installment payment of withdrawal liability a default of the entire withdrawal liability. There is nothing in the opinion or its logic to suggest that the principles of anticipatory repudiation have no role to play under the MPPAA, unless those principles were stretched so far out of shape that, for example, failure to make a single installment payment were deemed repudiation per se of the entire obligation.

So we proceed to the question whether there was in fact a repudiation here and if so when it occurred. Filing for

bankruptcy, though by virtue of the automatic stay it prevents the payee from invoking the usual remedies for breach of contract, 11 U.S.C. § 362; *Buckley v. Bass & Associates*, 249 F.3d 678, 680 (7th Cir. 2001), and enables the contract if still executory to be rescinded by the trustee in bankruptcy (or debtor in possession, if, as in this case at the relevant time, there is no trustee), § 365(a), is not anticipatory repudiation per se. For the trustee or debtor in possession can affirm the contract even if it contains a clause (a so-called "ipso facto" clause) that makes filing for bankruptcy a ground for termination. § 365(e)(B); *Lyons Savings & Loan Ass'n v. Westside Bancorporation, Inc.*, 828 F.2d 387, 393 n. 6 (7th Cir. 1987); *McAndrews v. Fleet Bank of Massachusetts, N.A.*, 989 F.2d 13, 17 (1st Cir. 1993). Affirmance is the opposite of repudiation, and the affirmance option thus makes it impossible to consider the declaration of bankruptcy itself, whether or not there is an ipso facto clause, a repudiation of a creditor's claim.

If the trustee or debtor in possession exercises the discretion that the Code gives him to reject the contract, that of course is repudiation. *See Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581, 589-90, 36 S.Ct. 412, 60 L.Ed. 811 (1916). But Allied, when in June 1989 it declared bankruptcy, didn't repudiate its withdrawal liability. It was still making contributions to the fund and there was a possibility that it would regain its financial footing (remember that it filed for reorganization under Chapter 11, not liquidation under Chapter 7). It might never withdraw from the fund and even if it did it might still be able to pay the withdrawal liability. Indeed, it did not yet *have* any withdrawal liability, for that liability attaches only when the employer "completely withdraws" from the multiemployer plan, 29 U.S.C. § 1381(a), which occurs only when he either "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered

operations under the plan." § 1383(a); *see Corbett v. MacDonald Moving Services, Inc.*, 124 F.3d 82, 84 (2d Cir. 1997); PBGC Opinion Letter 87-1, 1987 WL 68403 (Jan. 23, 1987). Merely filing for the protection of the bankruptcy court is not a repudiation of obligations or a cessation of operations. More broadly, insolvency, with or without a declaration of bankruptcy, does not equal dissolution. An insolvent firm is not necessarily out of business, and the parties with which it has contracts cannot automatically assume that the firm will default, Farnsworth, *supra*, § 8.21, p. 608 n. 16 and § 8.23, p. 613; *Martin v. Maldonado*, 572 P.2d 763, 770 n. 22 (Alaska 1977); *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz.App. 486, 484 P.2d 639, 647 (1971); *Restatement (Second) of Contracts, supra*, § 252 comment a, although insolvency can of course be a very ominous signal, entitling a creditor to demand security. E.g., *id.*; *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co., supra*, 484 P.2d at 647; cf. UCC 2-609.

The plan in this case contains an ipso facto clause. For it permits Central States to treat a member's declaration of bankruptcy as a default upon the occurrence of which "the outstanding amount of the withdrawal liability shall immediately become due and payable." The defendants' argument that the clause was even more—was a Doomsday Bomb *requiring* Central States, whether it wanted to or no, to treat the declaration of bankruptcy as a default—is contrary to the plan's terms, which are permissive rather than mandatory, cf. *Greenhouse Patio Apartments v. Aetna Life Ins. Co.*, 868 F.2d 153, 155-56 (5th Cir. 1989), and is bad policy as well, for reasons stated in *Board of Trustees v. Kahle Engineering Corp., supra*, 43 F.3d at 859 and n. 7. (Briefly, declaring a default may, by increasing the bankrupt's obligations, make it more difficult for the bankrupt to regain its financial footing and pay off the claims against it.) But even read permissively, the default clause in the Central States plan is an ipso facto

clause; and it is highly doubtful in light of the cases and considerations marshaled above that the MPPAA authorizes such clauses.

So by filing a proof of claim for the entire withdrawal liability that Allied would owe if it withdrew (remember that the declaration of bankruptcy was not itself a withdrawal), Central States was jumping the gun. No withdrawal liability had yet arisen or could be precipitated by the bankruptcy (because ipso facto clauses are unenforceable). Neither in June 1989 when Allied filed for bankruptcy, nor May 18 of the following year when Central States filed its proof of claim, had a cause of action for withdrawal liability arisen. The statute of limitations therefore did not begin to run on either date.

But it did begin to run—still more than six years before Central States sued—no later than June 18, 1990, when, Allied having ceased operations on June 2, Central States served on Allied a formal demand for payment of the withdrawal liability set forth in the proof of claim that it had filed in the bankruptcy proceeding. Complete cessation of operations precipitates, as we have seen, the employer's (and any affiliates') withdrawal liability. That was the default, and the demand determined its amount (before that determination, a suit would have been premature). It is true that Central States could not insist on *immediate* payment until the employer had a chance to invoke its right to arbitrate the amount of its withdrawal liability. 29 U.S.C. § 1401; *Chicago Truck Drivers, Helpers & Warehouse Union (Independent) Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 533 (7th Cir. 1997). Allied's duty to pay Central States would have been suspended by virtue of this rule until December 25, 1990, but the cause of action did not arise then--the right to arbitration presupposes that the cause of action has already arisen and has now to be adjudicated.

As a detail, we note that although "demanding" payment from a debtor in bankruptcy other than in the bankruptcy proceeding itself is normally a violation of the automatic stay, the demand for payment of withdrawal liability is probably an exception to this principle. *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1372, 1375-76 (7th Cir. 1992). As a further detail, we note that it is arguable that the statute of limitations actually began to run earlier than June 18, on June 2, since Central States had already computed the withdrawal liability and sent notice of the amount, via the proof of claim, to Allied, substantially complying with the statutory requirement for notice of and demand for withdrawal liability. 29 U.S.C. § 1399(b)(1); *Central States, Southeast & Southwest Areas Pension Fund v. Koder*, 969 F.2d 451, 453 (7th Cir. 1992). But this we need not decide, as the decision would not affect the outcome of the case.

Surprisingly, Central States has failed to make the strongest argument available to it for the timeliness of the suit, which is that the fact that it demanded payment on the installment plan shows that it didn't think Allied had defaulted. But the argument would not have succeeded even if it had been made. The statute *required* Central States to formulate an installment plan. § 1399(b)(1); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, Inc.*, 522 U.S. 192, 196, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997). And the reason for the requirement has nothing to do with determining when a default has occurred. The reason is that Congress conceived of withdrawal liability as a substitute for the annual payments that the employer would have made to the multiemployer pension fund had he not withdrawn. *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co., supra*, 513 U.S. at 418-19, 115 S.Ct. 981; H.R.Rep. No. 96-869, 96th Congress, 2d Sess., 1980 U.S.C.C.A.N. 2918. The Supreme Court made clear in *Bay Area* that the statutory

requirement does not prevent the fund from accelerating all future payments upon default, 522 U.S. at 210, 118 S.Ct. 542, thus making all the installments due at once. *See* also *Board of Trustees v. Kahle Engineering Corp., supra*, 43 F.3d at 857, 861.

So the only question is whether there was a default. There was. When Allied ceased operating, Central States knew it would never see any of the scheduled installment payments. It had an unsecured claim, so Allied could not make any of the installment payments without violating the absolute priority rule of 11 U.S.C. § 1129(b). With fewer assets than claims, Allied would certainly pay the fund less than the full value of its claim. The best the fund could hope for was a partial settlement of the withdrawal liability. It should therefore have concluded on June 2, 1990, that Allied had repudiated its withdrawal liability. Put differently, on that day it became clear that Allied had disabled itself from paying the withdrawal liability. The standard rule in contract law is that the promisee is free to sue for anticipatory repudiation as soon as the promisor has disabled itself from performing its contractual obligations. *See, e.g., Restatement (Second) of Contracts, supra*, § 250(b). All that remained to complete the cause of action was to determine the amount due, which happened, at the very latest, on June 18, more than six years before the suit was brought.

Central States argues finally that even if it could not, by reason of the statute of limitations, sue to recover the payment due on August 1, 1990, a suit or suits for the subsequent installments was not barred. But there is no relevant difference among the installments. All specified payments on dates within the six-year limitations period; if as we have just held a suit to collect the first installment nevertheless was barred by reason of acceleration, so were suits to collect all the subsequent ones.

We are not such skeptics as to deny the possibility of commercial miracles. Even if it seemed certain on June 2, 1990, that Allied would not be able to pay the first installment of its withdrawal liability due two months later, there was always the chance that, say, 16 months later, when the last installment was due, Allied would have had a miraculous recovery and could pay at least that installment. For all we know, it *has* had a miraculous recovery; the record is silent on whether and in what condition Allied emerged from bankruptcy. But all that is irrelevant. For it is unquestioned that if there was a default on June 2 or 18, Central States was entitled to accelerate the due date of all the installments to the present; the fourteenth installment became due immediately. Anyway the doctrine of anticipatory repudiation does not traffic in the miraculous. A breach occurs when it is reasonably certain that the other party is not going to meet its obligations under the contract in timely fashion. At that point the potential victim is freed from its own contractual obligations and authorized to take all reasonable self-protective measures, including suing. It is not required to twiddle its thumbs for 20 years (the maximum installment period under the MPAA, 29 U.S.C. § 1399(c)(1)(B), though the period here was only 14 months), while its prospects of recovering what it is owed ooze away. The point at which Central States knew that Allied was not going to meet its obligations (and also knew how much those obligations were) was reached no later than June 18 and required Central States to sue within six years of that date, which it failed to do.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 97-3794

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and HOWARD MCDOUGALL, trustee,
Plaintiffs-Appellants,

v.

BASIC AMERICAN INDUSTRIES, INCORPORATED, WATERFRONT DEVELOPMENT COMPANY, INCORPORATED, EFB DEVELOPMENT COMPANY, INCORPORATED, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 96 C 4736, Blanche M. Manning, Judge

February 27, 1998

ORDER

Before Hon. Richard A. Posner, *Chief Judge*
Hon. William J. Bauer, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*

On consideration of the "DEFENDANTS-APPELLEES' SEVENTH CIRCUIT RULE 3(c)(1) DOCKETING STATEMENT" filed on November 13, 1997, in which the

appellees contend that this appeal is premature and the court is without jurisdiction, and the "PLAINTIFFS-APPELLANTS' RESPONSE TO DEFENDANTS-APPELLEES' SEVENTH CIRCUIT RULE 3(c)(1) DOCKETING STATEMENT filed on December 8, 1997.

IT IS ORDERED that this appeal is DISMISSED. In its minute order of September 30, 1997, the district court granted defendants' motion to dismiss the first amended complaint, stating that "[a] detailed order will be filed on or before October 31, 1997 setting forth the reasons therefor." The district court, to date, has not issued an order explaining the reasons for its dismissal, *see* Circuit Rule 50, and has not entered a Rule 58 judgment. *See Smith v. Village of Maywood*, 970 F.2d 397, 400 (7th Cir. 1992) ("One of the purposes of this requirement [Rule 58] is to ensure that the parties and the appellate court can be certain about the proper timing of an appeal."). Plaintiffs are not harmed by dismissal of this appeal because they may file a new appeal (if they choose to proceed in this court) after the district court has stated its reasons for dismissal of the first amended complaint and entered its judgment in compliance with Federal Rule of Civil Procedure 58. *See Otis v. City of Chicago*, 29 F.3d 1159, 1162-66 (7th Cir. 1994) (en banc) (a party can always wait until compliance with Rule 58 before appealing, even though he could have appealed earlier.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

96 C 4736
Hon. Blanche M. Manning

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD MCDOUGALL,
Plaintiffs,

v.

BASIC AMERICAN INDUSTRIES, INC., *et al.*
Defendants.

MEMORANDUM AND ORDER

This matter is before the court on: (1) Plaintiffs Central States, Southeast and Southwest Areas Pension Fund's and Howard McDougal's (collectively, "Central States") motion to alter or amend this court's December 13, 1997 ruling [17-1]; (2) Defendants' motion to dismiss the first amended complaint [20-1]; and (3) Defendants' motion to vacate this court's November 26, 1996 Order and to dismiss the Plaintiffs' complaint [23-1]. For the reasons that follow, Plaintiffs' motion is denied and Defendants' motions are granted.

BACKGROUND

Central States, a multiemployer pension plan, brought this ERISA action to collect alleged delinquent withdrawal liability from Defendants, incurred when a non-party, Allied Companies, Inc., withdrew from Central States. The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), permits an underfunded multiemployer pension

plan to pursue a withdrawing employer for a portion of the plan's deficit. 29 U.S.C. § 1381.

Central States filed its initial complaint on July 31, 1996 against certain Defendants defined as the "Allied Control Group." On November 22, 1996, Plaintiffs filed an *ex parte* Motion to Extend Summons for 45 days, which was granted by this court on November 26, 1997, without argument from Defendants. By January 6, 1997, Central States completed service on the following Defendants: Basic American Industries, Inc.; Jackson's Realty & Builders Co.; C&B Wood Suppliers. Inc.; E&F Realty Co.; Waterfront Development Co.; EFB Development Co.; Turtle Creek Investment Co.; Liquid Oil Growers Organization, Inc.; Southwest Agri-Development Specialists, Inc.; and Brady R. Justice (collectively, the "Initial Defendants").[1]

On December 20, 1996, Central States filed its First Amended Complaint, naming the following additional Defendants: EFB Development Co.; Sanibel Development Co.; Sanibel Investment Co.; Turtle Creek of Tennessee; Hato Rey Professional Arts, Inc.; Turtle Creek North Apartments; Village Green Apartments; Turtle Creek Apartments of Kokomo; Turtle Creek Apartments of Frankfort; Turtle Creek Apartments of Connersville; Turtle Creek Apartments of Marion; Roxbury Square, Ltd.; Turtle Creek of Indiana; Wheel Estates; EFB Coal Co.; Horn AG Services Inc.; Table Fresh Grapes, Inc.; Arizona Desert Growers; Desert Vineyards, Inc.; Red Mountain Products; the Racquets IV Tennis Club, Inc.; and Ronald Hicks (collectively, "the Moving Defendants").[2] The Moving Defendants were not

---

[1] The Initial Defendants have brought the motion to vacate this court's November 26, 1996 Order and to dismiss the Central States' complaint, pursuant to Rule 4(m).

[2] The Moving Defendants have brought the Motion to Dismiss Central States' First Amended Complaint on statute of limitations grounds, pursuant to Rule 12(b)(6).

specifically named in the Plaintiffs' Original Complaint nor were they part of the entities that comprised the "Allied Control Group" as defined by Central States in its Original Complaint. All of the Moving Defendants were served with process on January 6, 1997, except for one who was served on January 10, 1997.

Both Central States' Original Complaint and First Amended Complaint allege that on August 1, 1990, the Initial Defendants and the Moving Defendants violated various ERISA sections when they "failed to pay [their] first payment of withdrawal liability." (First Amended Complaint at ¶ 52).

Subsequent to the filing of the First Amended Complaint, the litigants filed the following motions: (1) Central States moved to alter or amend this court's December 13, 1997 ruling denying Central States' second motion to extend time to serve Defendants Ethan and Franklin Jackson and dismissing the complaint without prejudice, pursuant to Rule 4(m) [17-1]; (2) Moving Defendants moved to dismiss the First Amended Complaint with respect to themselves on statute of limitations grounds, pursuant to Rule 12(b)(6) [20-1]; and (3) the Initial Defendants moved to vacate this court's November 26, 1996 Order granting Central States' motion for extension of time to serve the Initial Defendants and to dismiss the Plaintiffs' action as to themselves, pursuant to Rule 4(m) [23-1].

On September 30, 1997, this court issued a minute order denying Central States' motion and granting the Defendants' motions. This Memorandum and Order will more fully explain the reasons behind this court's September 30, 1997 minute order.

ANALYSIS

I. Moving Defendants' Motion to Dismiss on Statute of Limitations Grounds

A. Standard for a 12(b)(6) Motion to Dismiss

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must assume the truth of all facts alleged in the complaint, construing the allegations liberally and viewing them in the light most favorable to the plaintiff. *See, e.g., McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir.1989). Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Kunik v. Racine County, Wis.*, 946 F.2d 1574, 1579 (7th Cir. 1991), citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

The court will accept all well-pled factual allegations in the complaint as true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n. 2 (1977). In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. *Craigs, Inc. v. General Electric Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993). However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiffs claims, *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir.1992).

B. ERISA Limitations

The MPPAA requires that when an employer withdraws from a multiemployer pension plan governed by ERISA, the plan must assess withdrawal liability against that employer for the unfunded cost of his employees' vested pension benefits. 29 U.S.C. § 1396. The purpose of the withdrawal liability is to avoid shifting the financial burden of the unfunded pension benefits to other employers in the plan or,

ultimately, the Pension Benefit Guaranty Corporation, the insurer of such benefits. *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1371 (7th Cir.1992). In order to assess withdrawal liability, the pension plan must issue a notice and demand for payment of the withdrawal liability. 29 U.S.C. § 1399(d). Thereafter, if the employer does not pay its liability within sixty days, the payment becomes overdue, and the plan may pursue a court action to collect it. 29 U.S.C. § 1399(c)(2); *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 171 (7th Cir. 1993).

The Moving Defendants contend this action is barred by the relevant statute of limitations, 29 U.S.C. § 1451(f), which provides that an action for collection of withdrawal liability may not be brought after the later of "(1) 6 years after the date on which the cause of action rose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action maybe brought not later than 6 years after the date of discovery of the existence of such cause of action." The Seventh Circuit has held that for the purposes of § 1451(f), a cause of action arises "as soon as payment becomes overdue." *Navco*, 3 F.3d at 172. A payment becomes overdue sixty days after the date of demand for payment. 29 U.S.C. § 1399(c)(2); *Navco*, 3 F.3d at 171.

Here, the date of demand was on August 1, 1990. Thus, the payment at issue became overdue sixty days from August 1, 1990, on October 1, 1990, and Central States had six years from this date, until October 1, 1996, to bring its claims against the Moving Defendants. Accordingly, because the First Amended Complaint (the complaint in which the Moving Defendants were first named) was filed on December 20, 1996, the Court finds that Central States' action is

untimely with respect to the Moving Defendants and thus barred by the relevant statute of limitations, 29 U.S.C. § 1451(f).

C. Relation Back Under Rule 15(c)

Although a complaint may be barred by the applicable statute of limitations, Rule 15(c) of the Federal Rules of Civil Procedure creates an exception by allowing "the relation back of amendments changing or adding parties so long as no prejudice will ensue." *Woods v. Indiana Univ.-Purdue Univ. at Indianapolis*, 996 F.2d 880, 884 (7th Cir. 1993). Rule 15(c) provides, in pertinent part, that "[a]n amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." Fed.R.Civ.P. 15(c)(l) & (2).

To prevail on a relation back argument under Rule 15(c), a litigant must show that: (1) the amended complaint arises out of the same occurrence set forth in the original complaint; (2) the added defendant received notice of the institution of the action within the applicable statute of limitations so that it will not be prejudiced in maintaining its defense on the merits; and (3) the added defendant knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. *Wood v. Worachek*, 618 F.2d 1225, 1229 (7th Cir. 1980).

Here, as explained below, Central States has failed to show that the First Amended Complaint relates back to the Original Complaint.

1. Same Occurrence/Transaction

For an amendment to relate back under Rule 15(c), it is necessary that the "claim or defense asserted in the amended

pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2).

In the present case, the withdrawal liability led to the filing of the Original Complaint. The First Amended Complaint, adding the Moving Defendants, was based upon this same occurrence. The First Amended Complaint merely added new parties, and retained the original claims. Accordingly, this Court finds that the First Amended Complaint arose out of the same occurrences set forth in the Original Complaint.

2. Notice/Prejudice

Under Rule 15(c), the party added by the amended complaint must have "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." Fed. R. Civ. P. 15(c). In applying this aspect of the rule, "'notice' as that term is employed in the rule, serves as the means for evaluating prejudice." *Woods*, 996 F.2d at 888 ("the statute of limitations does not insulate from suit an individual who did not initially receive service (or other notice) . . . so long as no prejudice resulted"). Therefore, the amount of prejudice that an added defendant will suffer is judged by the amount of notice that he has received.

Interpreting the meaning of "prejudice," the Seventh Circuit noted that there will be no prejudice if either "the added defendant has had sufficient notice of the institution of the action . . . . or if a sufficient identity of interest exists between the new defendant and the original one so that relation back would not be prejudicial." *Norton v. Int'l Harvester Co.*, 627 F.2d 18, 20-21 (7thCir. 1980).

Here, Central States contends that the Moving Defendants had an identity of interest with the entities in the Original Complaint because they are considered a "single employer"

within the meaning of ERISA. Therefore, Central States contends that the Moving Defendants were not prejudiced.

Central States' argument, however, goes against the holding in *Central States Pension Fund v. Mississippi Warehouse Corp.*, 853 F. Supp. 1053, 1057-58 (N.D. Ill. 1994) (emphasis added), where the court held that:

> In a withdrawal liability case the commencement of the statute of limitations period *does not depend upon the pension fund's knowledge of the identity of all members of a control group* who may be jointly and severally liable.
>
> * * * *
>
> To hold that a cause of action does not accrue until a Fund learns of the identity of controlled group members would run counter to the purposes of such limitations which is to prevent stale claims which are difficult to prove and allow potential defendants to assess their liabilities.

Similarly, in *Navaco*, 3 F.3d at 172-73, the Seventh Circuit noted that:

> Six years from the time of the injury, which § 1451(f)(1) affords as the minimum in every case, is generous. Congress appreciated that it might be difficult to ascertain the existence of a claim and track down persons liable under the Employee Retirement Income Security Act, a complex statute. . . . Pension funds and other persons holding claims under ERISA can use that six years to investigate . . . . The pension funds in our case, however, see the six years as a period of rest and recuperation. Only after knowing that they have not been paid, and recognizing who is liable, does the six years even start, the funds say. Yet if the time does not begin until the fund knows everything it needs to know—the existence of the debt, nonpayment, and the identity (and relation to the employer) of control group

> members—why is the period so long? Statutes of limitations provide time within which a person who knows of an injury may conduct the investigation needed to learn whether he has a legal claim and, if so, who is liable. After completing the investigation, a pension fund should be able to make a demand (and, if necessary, file suit) in a matter of weeks. Allowing six years is understandable only on the assumption that the time was to be used to search for vital information.

The *Navaco* court added that "[a]ny other approach would make the statute of limitations illusory," and rejected the pension funds' argument—that the time would not even commence until all ancillary questions about the scope of control and the nature of the business have been resolved because "[d]oing the research on these questions is what the six years are for." *Id.* Accordingly, the court noted that:

> Turning six years into twenty-six is a job best left to magicians. Statutes of limitations serve vital social interests—the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities, and in the MIPPAA the unusual one of protecting the beneficiaries of the fund. Congress told the trustees of pension funds not to tarry in assessing and collecting liability.

Consequently, this court rejects Central States "control group argument," and because Central States has not presented any evidence that the Moving Defendants received sufficient notice under Rule 15(C), this court finds Central States has not met Rule 15(c)'s prejudice requirement.

3. Mistake of Misnaming the Proper Defendants

Lastly, Central States contends that the First Amended Complaint relates back because it mistakenly misnamed the proper parties in the Original Complaint.

Central States is correct in that "Rule 15(c) was designed to protect a plaintiff who names a party mistakenly and then discovers the proper party's identity after the statute of limitations has run." *Hill*, 924 F.2d at 1374. However, Rule 15(c) only applies to situations where a party mistakenly identifies a proper party, not in cases where the plaintiff completely omits the proper party altogether because the plaintiff does not know of their existence. *Wood*, 618 F.2d at 1230; *Hampton v. Hanrahan*, 522 F. Supp. 140, 143 (N.D. Ill. 1981). As the court in *Navaco* clearly spelled out, the plaintiff has a duty to diligently investigate to determine "who is liable," and six years is more than enough time to complete such an investigation. 3 F.3d at 171.

Here, the court finds that Central States was not diligent in its investigation of the Defendants. For example, Central States admit that in "[p]reparing to serve the[] original complaint," it discovered that it did not have all of the names of the proper Defendants. (Pl.'s Resp. at 9.) Central States further concede that they finally located the names of the Moving Defendants through an article in the *Indianapolis Business Journal* that was published in April of 1990. Thus, the information identifying the Moving Defendants was clearly available to Central States during the six-year period in which the statute of limitations was running.

In conclusion, although the Plaintiffs' First Amended Complaint arose out of the same occurrence set forth in the Original Complaint, the other requirements of Rule 15(c) have not been met. Therefore, this court cannot allow the First Amended Complaint to relate back to the date of the filing of the Original Complaint, and the First Amended Complaint, as it relates to the Moving Defendants, is barred by the statute of limitations.

II. Service of Process Under Rule 4(m)

Both Central States and the Initial Defendants have filed motions disputing the sufficiency of Central States' service of summons pursuant to Rule 4(m). Central States moved to alter or amend this court's December 13, 1997 order denying Central States' motion to extend time to serve Defendants Ethan and Franklin Jackson (collectively, "the Jacksons") and dismissing the complaint without prejudice, pursuant to Rule 4(m). Similarly, the Initial Defendants moved to vacate this court's November 26, 1996 Order extending Central States time to serve summons on the Initial Defendants, pursuant to Rule 4(m).

Rule 4(m) directs the court to dismiss an action without prejudice when service of the complaint is not made upon the defendant within 120 days after the filing of the complaint. When considering motions to dismiss for insufficiency of service under Rule 4(m), the court "must first inquire whether plaintiff has established good cause for failing to effect timely service." *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 340 (7th Cir. 1996). If good cause is shown the court should extend the time of service. *Id.* However, if good cause is not shown, the court has discretion to consider whether a "permissive extension of time is warranted" or dismiss the action without prejudice. *Id.* at 340-41.

The plaintiff has the burden to prove good cause under Rule 4(m). *Bachenski v. Malnati*, 11 F.3d 1371, 1376 (7th Cir. 1993). Although the Seventh Circuit has not set forth a "precise test for good cause," the plaintiff's "attempts at service need be at the very least . . . . accompanied by some showing of reasonable diligence before good cause [may] be found." *Id.* at 1376-77.[3] *See also Young v. City of Chicago*,

---

[3] Evasion of service of process is the "only example of good cause provided by the legislative history" of Rule 4(m). *Geiger v. Allen*, 850 F.2d 330, 333 (7th Cir. 1988), *citing* 1982 U.S. Code Cong. Admin. News 4434, 4446 n.25.

1995 WL 562093, at *4 (ND, Ill. Sept. 21, 1995) (Rule 4(m) "is intended to force parties and their attorneys to be diligent in prosecuting their causes of action"). "Inadvertent failure to serve" or "half-hearted efforts to serve the defendant" do not constitute good faith. *Geiger*, 850 F.2d at 333. *Accord Serlin v. Arthur Anderson & Co.*, 145 F.R.D. 494, 494 (N.D. III. 1993) ("Counsel's lack of diligence, inadvertence or negligence and half-hearted efforts to serve a defendant do not support a finding of good cause"). Moreover, "a statute of limitations problem will not serve to establish good cause" and prevent dismissal under Rule 4(m). *Floyd v. United States*, 900 F.2d 1045, 1048 (7th Cit. 1990).

Here, the court finds that the Plaintiffs have not demonstrated "good faith" in their failure to serve the Initial Defendants and the Jacksons within the 120 days prescribed by Rule 4(m). The facts presented to this court show that Plaintiffs were not diligent in their attempt to timely serve the Initial Defendants and the Jacksons.

For example, with respect to the Initial Defendants, after filing their Original Complaint, Central States never even attempted to serve the Initial Defendants during the 120 days required by Rule 4(m). Not until six days before the 120-day period ended did Central States seek an extension of time. In seeking an extension of time, Central States contended that it could not serve the Initial Defendants within 120 days because: (1) it wanted to serve all the defendants simultaneously to prevent the defendants from sheltering assets; and (2) the "maze of intercorporate relations" and Central States' "national litigation interests" hindered its efforts to serve the Initial Defendants.

The court finds both of these reasons to be without merit. In *Navaco*, the Seventh Circuit clearly spelled out that the plaintiff has a duty to diligently investigate to determine "who is liable," and six years is more than enough time to complete such an investigation. 3 F.3d at 171. Here, Central

States waited six years before filing its Original Complaint. Clearly, this was more than enough time to allow Central States to remedy the concerns that they raised above.

Likewise, with respect to the Jacksons, this court notes that the Jacksons are each listed in the Indianapolis telephone directory, and therefore, their addresses were easily ascertainable. Consequently, this court cannot find that Central States has demonstrated "good cause" to warrant an extension of time pursuant to Rule 4(m). *See Geiger*, 850 F.2d at 333 (affirming trial court's finding that plaintiff failed to establish good cause under Rule 4(m), where the defendant's telephone number was located in the Chicago phone book).

Finally, although this court has discretion to grant Central States a "permissive extension of time," *Panaras*, 94 F.3d at 340-41, this court finds that Central States has not presented any reasons for this court to grant such an extension.[4] Consequently, this court grants the Initial Defendants' motion and denies Central States' motion, and dismisses this action without prejudice, pursuant to Rule 4(m), with respect to the Initial Plaintiffs and the Jacksons.[5]

---

[4] The court notes that in *Torrespico v. Columbia College*, 1998 WL 703450, at * 10 (ND. Ill. Sept. 30, 1998), the court, in exercising its discretion to grant a "permissive extension," considered whether the statute of limitations "would bar the refiled action." Here, because of the lengthy six-year statute of limitation and Central States' lack of diligence, this court will not grant a "permissive extension," regardless of whether the statute of limitations bars Central States from refiling this action.

[5] Furthermore, Central States is advised that although an action dismissed without prejudice under Rule 4(m) may be refiled, such a refiling will be allowed only if it satisfies the applicable statute of limitations. *See. e.g., Bachenski*, 11 F.3d at 1373, 1378; *Lewellen v. Morley*, 875 F.2d 118, 119-20 (7th Cir. 1989). Filing of the original claim without effective service of process does not toll the statute of limitations. See *Lewellen*, 875 F.2d at 119-20.

CONCLUSION

For the foregoing reasons, this court: (1) denies Plaintiffs Central States, Southeast and Southwest Areas Pension Fund's and Howard McDougal's motion to alter or amend this court's December 13, 1997 ruling [17-1] and dismisses the complaint without prejudice, pursuant to Rule 4(m), as to Defendants Ethan and Franklin Jackson; (2) grants Defendants' motion to dismiss the first amended complaint [20-1] and dismisses the complaint with prejudice, pursuant to Rule 12(b)(6), as to Defendants: EFB Development Co.; Sanibel Development Co.; Sanibel Investment Co.; Turtle Creek of Tennessee; Hato Rey Professional Arts, Inc.; Turtle Creek North Apartments; Village Green Apartments; Turtle Creek Apartments of Kokomo; Turtle Creek Apartments of Frankfort; Turtle Creek Apartments of Connersville; Turtle Creek Apartments of Marion; Roxbury Square, Ltd.; Turtle Creek of Indiana; Wheel Estates; EFB Coal Co.; Horn AG Services Inc.; Table-Fresh Grapes, Inc.; Arizona Desert Growers; Desert Vineyards, Inc.; Red Mountain Products; the Racquets IV Tennis Club, Inc.; and Ronald Hicks; and (3) grants Defendants' motion to vacate this court's November 26, 1996 Order and to dismiss the Plaintiffs' first amended complaint [23-1] and dismisses the complaint without prejudice, pursuant to Rule 4(m), as to Defendants: Basic American Industries, Inc.; Jackson's Reality & Builders Co.; C&B Wood Suppliers. Inc.; E&F Realty Co.; Waterfront Development Co.; EFB Development Co.; Turtle Creek Investment Co.; Liquid Oil Growers Organization, Inc.; Southwest Agri- Development Specialists, Inc.; and Brady R. Justice. It is so ordered.

ENTER:

BLANCHE M. MANNING
U.S. DISTRICT COURT JUDGE

DATE: October 18, 2000

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 00-3920

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and HOWARD MCDOUGALL, trustee,
Plaintiffs-Appellants,

v.

BASIC AMERICAN INDUSTRIES, INCORPORATED, WATERFRONT DEVELOPMENT COMPANY, INCORPORATED, EFB DEVELOPMENT COMPANY, INCORPORATED, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 96 C 4736, Blanche M. Manning, Judge

July 3, 2001

ORDER

Before Hon., William J. Bauer *Circuit Judge*
Hon. Richard A. Posner, *Circuit Judge*
Hon. John L. Coffey, *Circuit Judge*

On June 19, 2001 plaintiffs-appellants filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

96 C 4736
Hon. Blanche M. Manning

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, and
HOWARD MCDOUGALL, trustee,
Plaintiffs,

v.

BASIC AMERICAN INDUSTRIES, *et al.*
Defendants.

Date: September 30, 1997

MINUTE ORDER

Plaintiff's motion (#17-1) to alter or amend ruling of December 13, 1997 is denied. Defendants' motion to dismiss the first amended complaint (#20-1) is granted. A detailed order will be filed on or before October 31, 1997 setting forth the reasons therefor. Defendants' motion to vacate (#22-1) this court's order of 11/26/96 and to dismiss (#23-2) this action without prejudice is granted. A detailed order will be filed on or before October 31, 1997, setting forth the reasons therefor.

Plaintiff's motion to alter or amend ruling is denied. The court has found that plaintiff failed to show good cause warranting an extension of time within which to effectuate service of summons. While the court has found an absence of

good cause, it has also considered whether a permissive extension was appropriate. In so doing, it has taken into account, in addition to other factors the substantial period of time which plaintiff has within which to effectuate service (6 years). The court was also mindful of the fact that the statute of limitations had run. In considering and weighing all of the facts brought to its attention, the court in the exercise of its discretion ruled against plaintiff. That ruling stands.